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In the

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 170

LOUIS WEINER, d/b/a LOUIS WEINER REAL ESTATE CO., and ROBERT L. SOLOMON,

Appellants,

vs.

STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA,

Appellee.

On Appeal From the Supreme Court of the State of Nebraska

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Nebraska Supreme Court affirming an Order of the appellee revoking appellant Weiner's real estate broker's license and appellant Solomon's real estate salesman's license. A timely motion for rehearing was overruled and rehearing denied by the Court below. Appellants submit this statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented:

OPINION BELOW

The opinion below is reported at 184 Neb. 752, 171 N. W. 2d 783, and is set out in full as an appendix hereto (Appendix, pp. 1a-4a). Also appended therewith is a copy of the judgment appealed from (p. 4a) and a copy of the order denying rehearing (p. 5a).

JURISDICTION

The appellee Commission, proceeding under Section 81-881 of the Nebraska Statutes, found appellants guilty of unfair trade practices and revoked their real estate licenses. Review *de novo* was had in the trial court and in the Supreme Court of Nebraska. The judgment of the Nebraska Supreme Court was dated and entered on November 7, 1969. Motion for rehearing was denied on January 6, 1970. Notice of appeal to this Court was filed in that Court on March 23, 1970.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(2). The following cases are believed to sustain the jurisdiction of this Court. *Konigsberg v. State Bar of California*, 353 U. S. 252; *Gillespie v. State Real Estate Commission*, 172 Neb. 308, 109 N. W. 2d 305; *Cramp v. Board of Public Instruction of Orange County*, 368 U. S. 278; *Stromberg v. California*, 283 U. S. 359; *Connally v. General Construction Co.*, 269 U. S. 385; *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278; *Saunders v. Shaw*, 244 U. S. 317; *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, and *Cole v. Arkansas*, 333 U. S. 196.

The Statute of Nebraska, the validity of which is involved, is officially cited as Section 81-881, Revised Statutes of Nebraska, 1943 (Reissue of 1966) and is set forth verbatim as follows:

> 81-881. *Real Estate Commission; unfair practices, defined.* The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any real estate broker or any real estate salesman and shall have the power to revoke or suspend any license, issued under sections 81-862 to 81-887, whenever the broker or salesman has been found guilty of any of the following unfair trade practices: (1) Refusing, because of race, color, national origin or ethnic group, to show, sell, rent, or lease any real estate for sale or rent on behalf of a principal, where such principal has not so restricted or limited prospective purchasers, renters, or lessors; (2) intentionally advertising, whether printed or by radio, display or other nature, which is misleading or inaccurate in any material particular or in any way misrepresents any property, terms, values, policies or services of the business conducted; (3) failing to account for and remit any money coming into his possession belonging to others; (4) accepting, giving or charging any undisclosed commission, rebate or direct profit on expenditures made for a principal; (5) acting in a dual capacity of broker and undisclosed principal in any transaction; (6) guaranteeing or authorizing or permitting any person to guarantee future profits which may result from the resale of real property; (7) placing a sign on any property offering it for sale or rent without the written consent of the owner or his authorized agent; (8) offering real property for sale or lease without the knowledge and consent of the owner or his authorized agent or on any terms other than those authorized by the owner or his author-

ized agent; (9) inducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal; (10) accepting employment or compensation for appraising real property contingent upon the reporting of a predetermined value or issuing an appraisal report on real property in which he has an undisclosed interest, unless such interest is disclosed in the report; (11) negotiating a sale, exchange or lease of real property directly with an owner or lessor if he knows that such owner has a written outstanding contract, in connection with such property, granting an exclusive agency to another broker; (12) soliciting, selling or offering for sale real property by offering free lots or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property; (13) representing or attempting to represent a real estate broker, other than the employer, without the express knowledge or consent of the employer; (14) paying a commission or compensation to any person for performing the services of a real estate broker or real estate salesman who has not first secured his license under sections 81-862 to 81-887; (15) the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman, whether of the same or of a different character as hereinbefore specified; (16) commingling the money or other property of his principals with his own or failure to maintain and deposit in a separate account all money received by a real estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; (17) failure to include a fixed date of expiration in any written listing agreement and failure to leave a copy of such agreement with the principal; (18) failure to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the

seller; (19) failure by a broker to deliver to the seller in every real estate transaction wherein he acts as a real estate broker, at the time such transaction is consummated, a complete, detailed closing statement, showing all of the receipts and disbursements handled by such broker for the seller; also failure to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what the same were disbursed; the broker shall retain true copies of such statements in his files; or (20) the broker or salesman shall have been convicted of a felony.

QUESTIONS PRESENTED

1. The Nebraska statute [Subsection (15)] permits revocation if a licensee is found to have demonstrated his "unworthiness or incompetency" to act as broker or salesman. Is the statute on its face or as applied to appellants overbroad in that it (1) fails to give adequate notice of whether conduct is proscribed and (2) leaves unfettered discretion in a commission to determine whether conduct is unworthy or incompetent?

2. Under the due process provisions of the Fourteenth Amendment is a broker or salesman protected against a license revocation penalty based upon a determination of activity found to be proscribed but never set forth or charged in the complaint purporting to give him notice and opportunity to defend?

3. Where a Commissioner, who later heard evidence and participated in the decision on a complaint against a broker, converses with a prosecutor prior to the hearing and expresses publicly in that conversation his opin-

ion that it is about time the broker's license be revoked, has the broker been denied due process of law in that he is deprived of the right to a fair hearing before an impartial tribunal?

4. Will a proper application of the due process requirements of the Fourteenth Amendment permit a finding of guilty on a charge totally devoid of evidentiary support?

STATEMENT

Appellant Louis Weiner is a real estate broker, licensed by the State Real Estate Commission of the State of Nebraska as such on May 25, 1952 (R. 242). Appellant Robert Solomon is a real estate salesman licensed on June 13, 1962 (R. 242). Appellants are not members of the Omaha, [Nebraska] Real Estate Board (R. 669) but engage in business in competition with members. Commissioner Grant Miller, a member of the State Commission, is a member of the Omaha Real Estate Board.

In May of 1967 the Omaha Real Estate Board by its Executive Vice President wrote a letter to the Commission stating in part with respect to Appellant Weiner (R. 670):

> "As previously mentioned, we have had on several occasions calls from the public concerning Mr. Weiner's method of doing business, but this is the first time that anyone has furnished us with documentation concerning a transaction."

The matter mentioned was referred by the Commission for investigation to Robert H. Petersen, Legal Coun-

sel for the Omaha Real Estate Board (R. 669), and also an investigator for the Commission. The Commission on its own Motion (R. 19) filed a complaint against the Appellants. Petersen drew the complaint (R. 372).

Prior to hearing and decision, Petersen and Commissioner Miller discussed the case of Weiner and the commissioner expressed the opinion that it was about time that Weiner's license be revoked. The testimony was (R. 289-290):

"Q. Did you, in fact, see any representatives or members of the Commission at Northrup-Jones?

A. That day Mr. Petersen and Mr. Miller were sitting at a table together.

Q. By Miller, you mean Mr. Grant Miller, one of the Commissioners?

A. Yes.

Q. Was anyone else there?

A. There was other people, I don't know who they were by name.

Q. Did you hear any conversation between Mr. Miller and Mr. Petersen?

A. Yes.

Q. What was the substance of that?

A. I heard the remark made, isn't that Tom Waller, and I heard the answer, yes, and the statement was made that basically, well, we finally got him out of the picture, and the same statement was made at the same time that it looks like we have got enough on Weiner to finally put him out.

Q. Who made the statement?

A. Mr. Petersen and Mr. Miller.

Q. In the first instance, who made the statement?

A. Mr. Petersen.

Q. To whom?

A. Mr. Miller.

Q. Was there any response from Mr. Miller?

A. He made the statement, 'It's about time.' ''

Petersen, called as a witness, did not deny the conversation. He testified:

"Q. Let me ask you this: Did you ever talk to any of the Commission members during the course of the investigation or after the complaint was filed with reference to Weiner's character?

A. I don't recall specifically talking to any Commissioner about it. Again, I may have.

Q. You may have talked to some of them as to his reputation?

A. Yes.

Q. And prior in point of time to the hearing itself?

A. Yes.

Q. Had you ever before the hearing—or the purported hearing, I should say—ever expressed an opinion publicly that the Commission would get Weiner's license?

A. Yes, I believe I did, that they would revoke his license; that I thought they would revoke his license.

Q. Would you recall when and where and to whom such statements were made?

A. I can't tell you a specific time and place or to whom.

Q. Do you recall hearing any Commission member prior to the hearing express an opinion that Weiner was not reputable or that he should lose his license?

A. I don't recall any Commissioner making that statement, no.

Q. Let me ask you specifically: Do you recall any conversations that you may have had or partaken in on or about July 29, 1967, in Northrup-Jones in Omaha between yourself and Commissioner Grant Miller and some other Omaha real estate licensees?

A. No, I don't recall that conversation.

Q. I take it that you wouldn't deny that you did talk to Commissioner Miller at a coffee table with some other gentlemen on or about that dat ?

A. I could very easily have visited with Grant Miller on that date in Northrup-Jones.

Q. I take it you wouldn't recall what was discussed or what was said.

A. No." (R. 322-324)

The question of the denial of appellant's right to a fair hearing before an impartial tribunal was preserved in the record. Answer (R. 11), Ruling of Trial Court (R. 78) and Motion for New Trial (R. 85).

The complaint against both appellants charges them, sometimes jointly, sometimes severally,[1] with acts presumably in violation of Section 81-881 of Nebraska's real estate commission law, which section consists of twenty numbered subsections, delineating "unfair trade prac-

1. Sometimes neither was charged by name or other definitive word.

tices". As to specific acts and situations alleged, the complaint (R. 687-690) does not attempt to specify by number which of the specific subsections were violated by appellants—nor does the order of the Commission finding appellants guilty (R. 705-710).

There is both mere formal and also important substantial variance between the Complaint making the charges and the Order finding the facts and the guilt of appellants. The Order did not, as would be expected, make a general finding that the allegations of the Complaint were true, nor did it do what is substantially the same thing and find the facts in the Order by using the same language as was used in making the allegations in the Complaint. An attempted statement of this aspect of the case in narrative form has proved extremely verbose and opaque so the exact variances have been concisely demonstrated by setting forth in the Appendix (pp. 5a-11a) in one text, paragraphs of the Commission complaint as it was changed by the Commission order.

The original text of the Complaint has been reproduced with those words bracketed which do not survive in the Order. Words not in the original Complaint but making their debut in the Order are printed in italics.[2]

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2. Exempli gratia: Paragraph III of the Complaint and Order

III.

That on February 1, 1966, *the* respondent, Robert L. Solomon, *together with Stephan A. Kort, a salesman employed by and acting on behalf of the respondent Louis Weiner,* secured a *written* purchase offer *for said real estate* in the amount of [Sev-

In substance the Complaint alleges facts indicating that an owner of real property listed that property for sale with Louis Weiner, a licensed real estate broker, and that Robert Solomon, one of Weiner's salesmen, received from a prospective purchaser a signed offer to buy the property. The offer as made by the prospective purchaser did not include any terms defining the obligations of the parties to pay generally described expenses. Solomon transmitted the offer to the property owner who accepted the offer as made; that no mention was made of closing costs to either sellers or purchasers; that Solomon added to a copy of the accepted offer words to the effect that sellers were to pay all costs and transmitted this copy to the H. A. Wolf Co. (the loan company). That Weiner sent two letters to this Company stating that he held a total deposit from the purchasers in the amount of $300.00 so as to mislead the Company into approving the loan.

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en Thousand Nine Hundred Fifty ($7,950.00) Dollars] $7,-*950.00* from Edgar Wilburn and Bernice Wilburn, husband and wife, and received an earnest deposit of [Fifty ($50.00) Dollars] *$50.00; that no authorization had been given by the owners to offer said real estate to a purchaser for price in excess of the listed price of $7,500.00;* that said [purchase] *written* offer was submitted to the owners, Werner A. Okerbloom and Mamie A. Okerbloom and [was] accepted by them.

The original Complaint can be read by reading the non-italicized text, both bracketed and unbracketed. The Order can be read by reading the non-italicized, unbracketed text together with the italicized text. In this instance, the indication is that Solomon without being so charged in the Complaint was found guilty by the Order of offering (without authorization from the owners) the real estate for a price in excess of the price stated in the listing contract.

The Complaint further recited that neither Weiner nor Solomon gave a copy of a closing statement to the purchasers.

Then the Complaint recited that the sellers were charged with all of the costs without their consent, that the statement furnished them charged them with too high a commission on the sale, charged them with receiving a down payment note they had not received and charged them with an item for insurance reserve and an item for a loan commitment renewal, both of which items were improper, and that the full amount due them according to the closing statement was not paid to them by Weiner until they demanded it.

Neither of the appellants were charged with but Solomon (and perhaps Weiner) were found guilty of offering the property for more money than the seller had listed it.

Neither of the appellants were charged with, but both were found guilty of misleading the Federal Housing Authority.

The appellant Solomon was not accused in connection with the charge made that the accounting between the broker Weiner and the owners contained improper amounts, but the appellant Solomon was found to have been with Weiner when Weiner accounted to the owners and Solomon was found guilty on this score.

Appellant Solomon was not charged with, but was found guilty of failure to explain the insurance reserve deduction.

Neither of the appellants were charged with, but both were found guilty of failing to explain various other items on the closing statement constituting the accounting between the broker and the seller.

Solomon, the salesman, was charged with and found guilty of failure to give a copy of the closing statement to the purchasers. Subsection (19) of the statute makes this the duty of the broker.

Weiner was charged with sending two letters to the H. A. Wolf Co. with intent to mislead it. When the evidence indicated that the letters were sent by Weiner's secretary without his prior knowledge (R. 547, 548, 559), the Commission found both Weiner and Solomon guilty of having "knowledge" of the letters (or at least one of the letters) prior to the closing of the transaction.

When the evidence failed to indicate who added the notation, Solomon (on the charge of adding a notation to a copy of the accepted purchase offer) was found guilty. The Commission found that both Weiner (not charged) and Solomon were guilty in that the notation was added "by the respondents *or by somebody* under their direction and control." (Emphasis supplied.)

All of these acts presumably demonstrated the unworthiness and incompetency of the appellants.

The answer of Solomon (R. 695) to the Complaint and Weiner's answer (R. 698) each alleged the constitutional infirmity of the statute under the due process of law provisions of the 5th and 14th Amendments to the United States Constitution. The question was not ruled on by the Commission.

Upon a *de novo* review upon the entire record in the District Court the appellants presented the question of invalidity, under the 5th and 14th Amendments, of Section 81-881 on its face and as applied to them and all others similarly situated who are engaged in the real estate business (R. 9, 10). At this point in the record they alleged with particularity (with reference to the mentioned Amendments) a deprivation of due process of law, an unlawful and unfettered delegation of power to define unfair trade practices, that the law was unconstitutional as being indefinite, uncertain and giving the Commission arbitrary power over the economic life or death of appellants and all others similarly situated, and that the action of the Commission and its purported Order permitted "interpretation of the law to act retrospectively" (R. 9).

The District Court entered a decree (R. 73-79) which dealt at some length (R. 74, 75) with appellants' federal objections and denied them. The District Court ruled:

> "Petitioners next assert that Sec. 81-881 R. R. S. is unconstitutional under the 5th and 14th Amendments to the Constitution of the United States * * * as depriving a citizen of property without due process of law and failing to contain sufficient legislative standards. This contention is without merit, as the license granted is not a property right guaranteed by the Constitution, Griffin v. Gass, 133 Neb. 56. The standards set forth are in no manner ambiguous or uncertain. On the contrary, it is easily discernible from a plain reading of the statute in question what acts are prohibited and in all respects are reasonable prohibitions on the activities of licensed individuals." (R. 75)

The Order of the Commission was affirmed by the trial court in all respects (R. 78). The federal issues were preserved in appellants' Motion for New Trial (R. 83, 84).

Appeal was taken to the Nebraska Supreme Court which reviewed the case *de novo* upon the entire record.[3] On November 7, 1969, the Supreme Court of Nebraska entered judgment of affirmance stating in part (*infra*, p. 4a):

> "This cause coming on to be heard upon appeal from the district court of Douglas County was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court."

Using language equally as broad as the Commission's finding of guilty "by their acts as herein set forth", the Nebraska Supreme Court held, "Definitely, their dealings in this transaction clearly violate the provisions of section 81-881, R. R. S. 1943, and their licenses should have been and were properly revoked." (Opinion below, *infra* p. 4a).

THE QUESTIONS ARE SUBSTANTIAL

The statute fails to give notice of conduct proscribed and leaves unfettered discretion to create new offenses.

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3. **Gillespie v. State Real Estate Commission,** 172 Neb. 308, 109 N. W. 2d 305, 307: "In reviewing the action of the State Real Estate Commission the district court and the Supreme Court are required to consider the matter de novo."

The Nebraska statute here drawn into question and applicable to thousands of licensed real estate brokers and salesmen in the state empowers the Real Estate Commission to impose a penalty of license revocation if it finds on any grounds at all that a licensee has demonstrated his unworthiness or incompetency to act as broker or salesman. Subsection (15) of Section 81-881 so provides. The other subsections of the section offer some suggestions as to what types of activity or omission might be said to give rise to a demonstration of "unworthiness or incompetency" but Subsection (15) goes out of its way, so to speak, to make crystal clear that any other acts of any other nature whether characterized elsewhere in the section or not may be seized upon as giving rise to a demonstration of "unworthiness or incompetency" on the part of a licensee.

It seems anomoulous but is true that here the State Legislature has specifically made clear that Subsection (15) is intended to be all inclusive when it defines unworthiness or incompetency. It has prescribed that a broker or salesman has demonstrated unworthiness or incompetency whenever the Real Estate Commission says he has. The statute on its face is unconstitutionally vague and overbroad in that no licensee has any reasonable way to tell what acts on his part are likely to give rise to a finding that he has demonstrated his unworthiness or incompetency to act as broker or salesman. *Cramp v. Board of Public Instruction*, 368 U. S. 278, 283; *Connally v. General Construction Co.*, 269 U. S. 385, 391; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 465; *Stromberg v. California*, 283 U. S. 359, 369. The Commission is left

with unfettered discretion in this area and in the area of severity of punishment to be imposed. *Barsky v. Board of Regents*, 347 U. S. 442. This Court in saving the statute in *Barsky* condemned the statute here when it said:

> "As interpreted by the New York courts, the provision is extremely broad in that it includes convictions for any crime in any court of competent jurisdiction within or without New York State. This may be stringent and harsh but it is not vague. The professional standard is clear. The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of the discipline to the specific case."

Here the statute specifically dictates that the duty of the enforcing officers is to define the offense and then in their further discretion impose the level of punishment, thus compounding the overall unfettered character of commission power over the professional life or death of a licensee.

Not only is the statute constitutionally infirm on its face, but also its application to appellants demonstrates an overbreadth and vagueness incapable of reasonable forecast.

In the case of salesman Solomon, he was found guilty under the wide scope of Subsection (15) of being present after the real estate closing when the buyers were also present and of failing on that occasion to deliver them a copy of the closing statement. Subsection (19) makes this delivery a specific duty of the broker in whose employee Solomon was. Thus, as applied in this case, the salesman was found guilty in the theretofore unseen circumstance (now retrospectively clear) that if a broker-

employer fails to perform a specific duty imposed by the act upon the employer, the employee must assume the broker's duties or he (the salesman) will be deemed to have demonstrated unworthiness or incompetency under the catchall provisions of Subsection (15). Here the Commission defined a new salesman offense, and it cannot be gainsaid that Subsection (15) is broad enough to cover it even though salesmen were not theretofore required to assume the prerogative of performing acts to be performed by and within the exclusive control of their employers.

Solomon was also found guilty of other acts which in substance were within the control of his employer. The broker accounts to the buyer and seller, the broker charges his selling client a commission. The salesman has no control as to how the broker does business with his own clients. The act as applied to Solomon changed this not as to authority but as to consequences. The Nebraska Supreme Court included Solomon when it said: "Clearly, *their* clients did not receive the amount they should have received under the signed sales contract. Admittedly *appellants* made charges for expense which was not incurred. Admittedly, *they* did not give credit for a $100. cash payment made by the purchasers.[4] Obviously, *they* charged a largor commission than that called for in the listing agreement. Definitely, *their* dealings in this trans-

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4. In this sentence the Nebraska Supreme Court made a finding of guilty which had not been made by the Commission. No charge with respect to this $100 payment was ever made against either appellant. Nor was either appellant found guilty until this indication in the opinion of Nebraska's highest court.

action clearly violate the provisions of Section 81-881, R. R. S. 1943, and *their* licenses should have been and were properly revoked." (Emphasis added.)

Without naming either appellant, it was both charged and found generally by the Commission (in paragraphs IV of the Complaint and the Order, respectively) that the completed sales contract did not provide who was to pay "loan fees, closing costs, escrow, etc. (*sic*)." Thus it was brought to pass by the Commission under the "unworthiness and incompetency" provisions of the statute that if the contract entered into by the buyer and seller does not contain definite provisions as to which party thereto is to pay certain items (including an item described as "etc.") the broker and the salesman are unworthy and incompetent and their licenses may be revoked. The words of the statute contain no hint that if the contracting parties enter into a contract which the Commission finds improper (on the basis that it does not contain a definitive obligation on the part of one of the parties to pay "etc." or on any other basis) a broker or salesman having anything to do with the transaction may suffer the penalty of a license loss.

Such vagueness and overbreadth of a statute in its application is difficult to characterize other than by remarking that its distance from due process might be equated in our space age with the reach to a far galaxy indeed. The statute leaves a licensee's very right to make a living subject to the whim and caprice of the enforcing Commission not only in defining the offense but also in determining which punishment fits the newborn crime.

The right to make a living is protected against procedures which authorize its deprivation for conviction of offenses without notice and opportunity to defend.

There yet remains a need to make clear in this country that the right to engage in a licensed calling—the right to make a living in an area of endeavor where the state feels a need to protect the public by requiring qualifications and proscribing acts—is a protected right, not a matter of grace; that although there may be a difference in degree (in our scale of values as to the importance of any one activity relative to another) between lawyers, doctors, engineers and real estate brokers and salesmen they all enjoy the same fundamental protections when a commission or board or agency confronts them with the threat of having their means of livelihood taken away.

In the case now here, not only did the statute involved fail to meaningfully define the acts of which appellants were accused, but also a successful defense against the charges made would not have saved their licenses. They were found guilty of charges never suggested by the complaint served upon them. Cf. *Cole v. Arkansas*, 333 U. S. 196, 201. There was no opportunity to defend. Much of what they had done that was deemed reprehensible was first brought to their attention by the order finding them guilty. There was not even a belated attempt to amend the complaint such as was struck down by this Court in *In re Ruffalo*, 390 U. S. 544. As was said there at 551, "These are adversary proceedings of a quasi-criminal nature. * * * The charges must be known before the proceedings commence. They become a trap when, after they are underway, the

charges are amended on the basis of testimony of the accused."[5]

Here without even the warning of an amendment, the appellants were found guilty of diverse matters held to show their incompetency and unworthiness. As was stated in another context in *Gregory v. City of Chicago*, 394 U. S. 111, quoting from *Garner v. Louisiana*, 368 U. S. 157 at 164, "[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support the conviction."

This conviction without warning and an opportunity to defend was not alone a practice indulged by the Commission. The Nebraska Supreme Court reviewing the record *de novo* noted that appellant Weiner in his accounting with the sellers had mistakenly not accounted for a late $100.00 payment made by the purchasers after the account had been made up by his secretary. Weiner had not been charged with this failure by the Commission and although he had been found guilty by the Commission of other matters with which he had not been charged, the Commission had apparently missed this one and although not charged he was also not found guilty. The Nebraska

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5. The Nebraska statutes make it a crime to act as broker or salesman without a license: "Any person, partnership, corporation or association acting as the real estate broker or real estate salesman, as described in sections 81-862 to 81-887, without having first obtained the license, herein provided for, shall upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than five-hundred dollars." Section 81-887, Revised Statutes of Nebraska (Reissue of 1966).

Supreme Court supplied the deficiency and found not only Weiner but also Solomon, his salesman, guilty of Weiner's mistake—completely without notice or opportunity to defend. This additional flavor of frontier or backwoods justice compounded by the lack of art in the Commission's complaint making the charges and the Commission's order ranging far beyond the Complaint in making guilty findings brings the entire scope of state proceedings from the administrative tribunal through the state's highest court dangerously near the kangaroo category.

The revocation of appellants' licenses rested upon constitutionally impermissible grounds and should not be allowed to stand. *Stromberg v. California*, 283 U. S. 359, 368; *Williams v. North Carolina*, 317 U. S. 287, 292, and see *Barsky v. Board of Regents*, 347 U. S. 442, 471 (Frankfurter, J., dissenting), a non-jury proceeding.

The right to a fair hearing before an impartial tribunal.

This case presents squarely the important question, not reached in *Ruffalo*, of a fair hearing by an impartial tribunal, and the question is presented as to state action undiluted by considerations that in *Ruffalo* the proceeding related to disbarment from the bar of a court in the federal judicial system.

The appellant Weiner's competitors grouped in the Omaha Real Estate Board enjoyed the advantage of their local counsel acting as a prosecutor for the State Commission and communicating before hearing and decision

with at least one of the Commissioners with respect to the merits of Weiner's case.

This Court said in *In re Murchison*, 349 U. S. 133, 136, "A fair trial in a fair tribunal is a basic requirement of due process." The opinion went on to add that although fairness requires an absence of actual bias our system of law has always endeavored to prevent even the probability of unfairness. Cf. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 50.

No matter how Commissioner Miller's words to the effect that it was about time that Weiner's license be revoked are construed, the probability of unfairness is clear and actual bias existed at least to the extent that appellant Weiner would have had to have been pure gold to pass as silver. As to the appellant Weiner, the expressed attitude of the Commissioner poisons the entire proceedings and requires reversal of the revocation.

Finding totally devoid of evidentiary support.

With respect to appellant Solomon, this case presents the question of an entire absence of evidentiary support for a charge of which he was found guilty. Solomon was charged with placing a notation on an information copy of a contract between the buyers and sellers to the effect that the sellers would pay closing costs. The contract copy was one which was in the loan company's possession and passed through numerous hands (R. 500). Solomon was apparently found guilty of this charge (as was Weiner who was not charged). There was no evidence as to how the words came to be on the

copy or who put them there and the Commission found that Weiner and Solomon or "somebody under their direction and control" added the words. *Gregory v. City of Chicago*, 394 U. S. 111; *Thompson v. City of Louisville*, 362 U. S. 199, where (as here) the question was not sufficiency of the evidence, but whether the conviction rested on any evidence at all, and see *Konigsberg v. State Bar*, 353 U. S. 252, involving absence of a rational ground in the evidence for the determination of failure to show good moral character.

Authorities indicating jurisdiction in this Court.

While the opinion of the Nebraska Supreme Court contains the general statement, "There can be no question but that any due process of law requirements have been fully satisfied herein." (Appendix, p. 3a) counsel for appellants moved that Court for a certificate that the federal questions were considered and passed upon. (See the motion appended to appellants' Application for Extension of Time to Docket Appeal.) The motion was denied without reasons for the denial.

The case of *Gillespie v. State Real Estate Commission*, 172 Neb. 308, 109 N. W. 2d 305, indicates the practice in Nebraska that the State Supreme Court must consider the matter *de novo* upon the record. The Court has plenary power as is indicated in the case now here by the fact that the record was reviewed *de novo* to the extent that the Court found appellants guilty with respect to a One Hundred Dollar item not charged against them and not found in the Commission's Order. The record is replete with appellants' federal objections. The judg-

ment of the Nebraska Supreme Court recites (Appendix, p. 4a), "* * * the court finds no error apparent in the record of the proceedings and judgment of said district court. * * *" See in this connection *Konigsberg v. State Bar of California*, 353 U. S. 252, 254-258.

The primary question presented by appeal is the validity of the state statute under which appellants' licenses were revoked. *Gramp v. Board of Public Instruction of Orange County*, 368 U. S. 278; *Stromberg v. California*, 283 U. S. 359, and *Connally v. General Construction Co.*, 269 U. S. 385.

Independently, the act of the Nebraska Supreme Court in finding appellants guilty of a failure to give credit for a $100.00 payment when they were never charged on this account and never found guilty by the Commission constitutes an unauthorized act by the State of Nebraska directly depriving the appellants of due process of law. In such a circumstance, inquiry of the state court of whether the state has authorized the wrong is irrelevant.[6] *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278; *Saunders v. Shaw*, 244 U. S. 317, 320; and *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 681-682: "But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State

---

6. Nevertheless, action has been taken looking to producing as a part of the record below appellants' Motions for Rehearing and Briefs thereon. (See Appendix page 11a.)

has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Cf. *Cole v. Arkansas*, 333 U. S. 196, 201.

CONCLUSION

Basically, all of the questions involved in this appeal hinge on the fundamental rights of notice and an opportunity to be heard before being condemned. Notice in a definative statute of the nature of conduct proscribed. Notice prior to trial of the offense charged. An opportunity to be heard before a fair and impartial tribunal, and the right not to be condemned on evidence affording no rational basis for a finding of guilt. The appellants and potentially all other licensees in the state have been deprived of these basic guarantees essential to the protection of their right to make a living. The record of the proceedings below strongly indicates that the instant appeal should be considered by this Court on briefs and oral argument—if indeed the record does not indicate that the judgment below requires summary reversal.

Respectfully submitted,

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Counsel for Appellants.

APPENDIX

Opinion of the Supreme Court of Nebraska

WEINER vs. STATE REAL ESTATE COMMISSION

37330 Filed November 7, 1969

1. An attorney retained by the Nebraska State Real Estate Commission is not an employee within the ambit of section 81-864, R. R. S. 1943.

2. The Nebraska State Real Estate Commission is not required by the Administrative Procedures Act to set out statutory provisions in its rules and regulations.

3. Section 84-909, R. R. S. 1943, is only applicable to those procedures which have not been specifically covered by statute.

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCown, and Newton, JJ.

SPENCER, J.

This is an appeal from the district court for Douglas County, Nebraska, which after a trial de novo entered a judgment affirming the order of the Nebraska State Real Estate Commission revoking the real estate broker's license and the real estate salesman's license of Louis Weiner and Robert L. Solomon respectively.

Appellants predicated error on the contention that the proceedings were void because of alleged violations

of sections 81-864, 81-884, and 84-909, R. R. S. 1943. The investigation herein was made by one Robert H. Petersen who is the local Omaha counsel for the Nebraska State Real Estate Commission, hereinafter referred to as commission. He is also legal counsel for the Omaha Real Estate Board.

Section 81-864, R. R. S. 1943, so far as material herein, provides in part: "The commission shall employ a director who shall keep a record of all the proceedings, * * *. Neither the director nor any employee of the commission may be an officer or paid employee of any real estate association or group of real estate dealers or brokers." Appellants contend Mr. Petersen was an employee of both groups and the proceedings based upon his activities are void. Mr. Petersen was not an employee or officer of either group. He was retained as counsel for both and served as an independent contractor rather than as an employee. He maintains a private law practice in Douglas County and the only control exercised over him by either group is the normal one in an attorney-client relationship. While we fail to see the relevance herein, we hold that Mr. Petersen is not an employee within the ambit of section 81-864, R. R. S. 1943.

Appellants further urge that the director of the commission violated section 81-864, R. R. S. 1943, because the action taken to revoke appellant's licenses was not recorded in the commission's minutes. There is no requirement that it be so included. The proceedings were all a part of the commission's records. The hearing was recorded by an official court reporter and the transcript is a part of the record herein. The certified copy of the com-

mission proceedings, received as an exhibit herein, includes the order of revocation which recites in detail portions of the evidence and the findings thereon subscribed by the members of the commission. This is a sufficient record of the official acts of the commission.

Appellants further complain that the commission made no finding of facts as required by section 81-884, R. R. S. 1943, after its hearing on the revocation. We determine that the commission made detailed findings as recited above.

Appellants further contend the proceedings are a nullity because of the failure of the commission to comply with section 84-909, R. R. S. 1943, providing for the adoption of rules and regulations governing all formal and informal procedures of the commission's hearings. The commission has filed rules and regulations, but they did not specifically detail the procedure to be followed in the determination of contested cases. However, sections 81-882 through 81-884.01, R. R. S. 1943, set out in detail the notice, hearing, and trial provisions in contested cases, and section 84-914, R. S. Supp. 1967, details evidentiary and trial procedures for all administrative agencies. The commission is not required to set out statutory provisions in its rules and regulations. There can be no question but that any due process of law requirements have been fully satisfied herein. Section 84-909, R. R. S. 1943, is only applicable to those procedures which have not been specifically covered by statute.

Appellants' final assignment of error is premised on their contention that their conduct was not detrimental

to any person and they were not given an opportunity to rectify it after discovery. We find it difficult to understand appellants' argument. We do understand the suggested inference that by overcharging they might have been doing their clients a favor by keeping their assets within the maximum limit for public housing. Clearly, their clients did not receive the amount they should have received under the signed sales contract. Admittedly, appellants made charges for expense which was not incurred. Admittedly, they did not give credit for a $100 cash payment made by the purchasers. Obviously, they charged a larger commission than that called for in the listing agreement. Definitely, their dealings in this transaction clearly violate the provisions of section 81-881, R. R. S. 1943, and their licenses should have been and were properly revoked.

The judgment of the trial court is affirmed.

AFFIRMED.

Judgment of the Supreme Court of Nebraska

November 7, 1969

* * *

This cause coming on to be heard upon appeal from the district court of Douglas county was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is,

affirmed; that appellee recover of and from appellants its costs herein expended, taxed at $; for all of which execution is hereby awarded and that a mandate issue accordingly.

Order on Motion for Rehearing

January 6, 1970

* * *

This cause coming on to be heard upon motion of appellants for a rehearing herein was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Complaint and Order—Combined Text

II.

That on the 21st day of January, 1966, the respondent, [Robert L. Solomon,] *Louis Weiner, acting through one of his salesmen,* secured from one of the owners, Werner A. Okerbloom, a listing agreement on [the real estate numbered and] *a residence property* known as 3217 Charles Street, Omaha, Nebraska; that said listing agreement provided for a *selling price of $7,500.00 and broker's* commission of six [per cent] *percent* (6%) of the selling price [or a minimum of Four Hundred Fifty ($450.00) Dollars] *or a minimum of $450.00.*

III.

That on February 1, 1966, *the* respondent, Robert L. Solomon, *together with Stephan A. Kort, a salesman employed by and acting on behalf of the respondent, Louis Weiner,* secured a *written* purchase offer *for said real estate* in the amount of [Seven Thousand Nine Hundred Fifty ($7,950.00) Dollars] *$7,950.00* from Edgar Wilburn and Bernice Wilburn, husband and wife, and received an earnest deposit of [Fifty ($50.00) Dollars] *$50.00; that no authorization had been given by the owners to offer said real estate to a purchaser for price in excess of the listed price of $7,500.00;* that said [purchase] *written* offer was submitted to the owners, Werner A. Okerbloom and Mamie A. Okerbloom, and [was] accepted by them.

IV.

That said purchase offer was conditioned upon the ability of the purchasers to obtain an [F. H. A.] *FHA* loan [and]; that when said purchase offer was signed by the purchasers and sellers it contained no provision as to [whom] *who* was to pay loan fees, closing costs, [escrows] *escrow,* etc.; that no mention was made regarding closing costs to either the purchasers or [the] sellers [except that the sellers were advised that they would have to pay the regular F. H. A. discount at the loan company to which the sellers verbally agreed.]

V.

That in connection with the application for the [F. H. A.] *FHA approved* loan *for the purchasers, the*

respondent, Robert L. Solomon, submitted *to the H. A. Wolf Co.* an alleged *true* copy of said purchase offer [to the H. A. Wolf Co.] */ signed by the buyers and the sellers*; that said alleged *true* copy contained the following statement: "[Sellers] *seller is* to pay all allowable closing costs per Weiner Real Estate Co. [;"] "; that said statement was not *contained* on either the [purchasers'] *purchasers* or [sellers'] *sellers* copy and was added to the copy submitted to the loan company by [respondent, Robert L. Solomon,] *the respondents or by somebody under their direction and control*, after it was signed by [both] *the* parties to the agreement; that the sellers [never verbally] *neither orally nor in writing ever* agreed to pay the purchasers closing [costs] *cost*.

VI.

That on the 17th day of February, 1966, respondent, Louis Weiner, *acting by and through his secretary, June Brandon,* sent a letter to the said H. A. Wolf [Co.] *Company* stating that [his company] *the Louis Weiner Real Estate Co.* was holding a [Two Hundred Fifty ($250.00) Dollar] *$250.00* earnest deposit from the purchasers in connection with this transaction when in fact [he held no such deposit] *the only money being held was the $50.00 paid at the time of the signing of the purchase offer by buyers;* that on February 21, 1966 [respondent, Louis Weiner, sent another letter to said loan company stating that he had received another Fifty ($50.00) Dollars] *a similar letter was sent to said loan company stating that the Louis Weiner Real Estate Co. had re-*

ceived another $50.00 deposit from the purchasers making a total earnest deposit of [Three Hundred ($300.00) Dollars when in fact he had no such deposit; that said letters] *$300.00, when in fact no additional moneys had been paid to the buyers; that the respondents had knowledge of said letter prior to the closing of the sale and* were sent to the said H. A. Wolf Co. so as to intentionally mislead it *and the Federal Housing Authority*, with the knowledge *of the respondents* that said loan would not be [approved unless said deposit had been made by said purchasers] *closed upon said representations an FHA approval was obtained for a loan to the purchasers.*

VII.

That upon the closing of said sale neither of the respondents, who were both present at said closing, delivered a copy of a closing statement to said purchasers.

VIII.

[That upon the closing of said sale the sellers were charged with all of the purchasers' closing costs without their consent or agreement;] *That neither of the owners of said property were present at the closing of said sale, but subsequent thereto, the respondents, Louis Weiner and Robert L. Solomon, came to the home of the owners, Werner A. Okerbloom and Mamie A. Okerbloom and submitted to them a closing statement wherein said owners had been charged with all of the purchasers closing costs as well as all the sellers closing costs;* that [sellers] *said* closing statement [contains] *contained* a debit to

them of a [Note] *note* for [downpayment] *a down payment* in the sum of [Two Hundred Fifty ($250.00) Dollars] *$250.00* when in fact [there was no such note] *no such note had been given;* that [sellers] *said* closing statement [contains a debit of Six Hundred ($600.00) Dollars for commission when said commission should have been Four Hundred Seventy-Seven ($477.00) Dollars, the amount agreed upon in said listing agreement and that the sellers never verbally agreed to pay more than six per cent (6%) commission; that respondent, Louis Weiner, when settling with the sellers first delivered them a check for Four Thousand ($4,000.00) Dollars of the net proceeds from said sale instead of the sum of Six Thousand Four Hundred Nine and 88/100ths ($6,409.88) Dollars shown on said statement as due them and only paid the balance of Two Thousand Four Hundred Nine and 88/100ths ($2,409.88) Dollars to sellers when demand was later made upon him by said sellers; that said sellers' closing statement contains a debit of Fifty-Five ($55.00) Dollars for "insurance reserve" when said item should not have been charged to sellers and that respondent, Louis Weiner, failed to explain said item to the sellers, that sellers' closing statement contains a debit of Thirty-Five ($35.00) Dollars to renew F. H. A. appraisal and this charge was made against the sellers when in fact no new F. H. A. appraisal was made or charged for.] *further contained a charge of $35.00 for an FHA appraisal, although such appraisal fee was never paid, a previous appraisal still being in effect, a charge for a credit report on the purchasers in the amount of $55.00, which was shown by the evidence to be a charge for one*

years insurance premium for a policy of insurance issued to the purchasers on the property conveyed to them; that said closing statement further contained a debit of $600.00 for commissions to the respondents, when in fact such commission should have been in the sum of $477.00.

IX.

That the respondent, Louis Weiner, first delivered to the purchasers a check in the amount of $4,409.88 and stated that he would hold the balance of $2,000.00 due them for a period of one year, in payment of the $6,409.88 shown by said closing statement to be due the owners; that said total sum of $6,409.88 was not paid to the owner until demand was made by them for the full amount, when a check was delivered to them in the amount of $6,409.88

X.

That at no time was an agreement entered into between respondents and the owners, Werner A. Okerbloom and Mamie A. Okerbloom, which altered modified or superseded the listing agreement dated January 21, 1966.

XI.

That at the time involved herein the said Werner A. Okerbloom was 81 years of age, was in ill health and was a man of little business experience and had no knowledge of matters which should properly be charged to sellers in a real estate transactions; that at said time Mamie A. Okerbloom was 76 years of age, a housewife who had no business experience, and had no knowledge of business transactions, particularly matters relating to the sale of

real estate; that said owners did not understand the charges that were being made against them in said closing statement and that the respondents failed to explain these items to them and that said owners did not discover the illegal and improper charges made against them until a later date.

[IX] *XII.*

That the respondents [named herein] , *Louis Weiner, and Robert L. Solomon,* and each of them, by their [actions] *acts* as herein set forth, are guilty of violating Section 81-881, R. R. S. 1943 and have by said acts demonstrated their unworthiness and incompetency to act as broker and salesman respectively.

Letter to Clerk, Nebraska Supreme Court

May 12, 1970

Mr. George H. Turner
Clerk, Nebraska Supreme Court
State Capitol Building
Lincoln, Nebraska

In re: Weiner, et al. v. State Real Estate Commission
General No. 37330

Dear Mr. Turner:

I note that the record on appeal for the Supreme Court of the United States in the captioned matter does not contain appellants' Motions for Rehearing and Briefs thereon. Inasmuch as the Supreme Court of Nebraska found Mr. Weiner and Mr. Solomon guilty of acts for which they were neither charged nor convicted before the Commission, it is necessary in order to preserve the error

on appeal to show the Motions for Rehearing and the Briefs thereon.

We would appreciate it if you could take care of this matter at your earliest convenience since we anticipate docketing the appeal for the Supreme Court of the United States on or about May 15, 1970.

Thank you for your attention to this matter.

Sincerely,

FOULKS, WALL & WINTROUB

By BENJAMIN M. WALL

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In The

Supreme Court of the United States

LOUIS WEINER, d/b/a LOUIS WEINER REAL ESTATE CO., and ROBERT L. SOLOMON, APPELLANTS,

VS.

STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

On Appeal From the Supreme Court of the State of Nebraska

MOTION TO AFFIRM OR DISMISS AND BRIEF IN SUPPORT OF MOTION

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In The

Supreme Court of the United States

LOUIS WEINER, d/b/a LOUIS WEINER REAL ESTATE CO., and ROBERT L. SOLOMON, APPELLANTS,

VS.

STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

On Appeal From the Supreme Court of the State of Nebraska

MOTION TO AFFIRM OR DISMISS AND BRIEF IN SUPPORT OF MOTION

MOTION TO AFFIRM OR DISMISS

Appellee, State Real Estate Commission of the State of Nebraska, moves the Court to affirm the decision of the Nebraska Supreme Court in this action, or in the Alternative, to dismiss this appeal, for the following reasons:

(1) The appeal does not present a substantial federal question.

(2) The decision of the Nebraska Supreme Court rests on an adequate non-federal basis.

(3) The alleged defects in the administrative hearing before the State Real Estate Commission, if any, were cured by the appeal taken by appellants to the District Court of Douglas County, Nebraska, and to the Nebraska Supreme Court, the matter being tried *de novo* in each of said Courts.

(4) The Nebraska Statutes which set forth the procedures for disciplinary action against licensed real estate brokers and licensed real estate salesmen provide due process of law as required by the Fourteenth Amendment to the Constitution of the United States.

BRIEF IN SUPPORT OF MOTION

STATEMENT OF THE CASE

Louis Weiner, a real estate broker, and Robert L. Solomon, a real estate salesman, have filed an appeal from the decision of the Supreme Court of Nebraska, which affirmed a judgment of the District Court of Douglas County, Nebraska revoking the real estate licenses held by the appellants. The opinion of the Nebraska Supreme Court is reported in 184 Neb. 752, 171 N. W. 2nd 783, and is set out in the Appendix to Appellants' Jurisdictional Statement at pages 1a - 4a.

These proceedings originated with the filing of a complaint against the appellants before the State Real Estate Commission of the State of Nebraska. Written answers to the complaint were filed by each of the appellants. Hearing was had before the Commission on August 28, 1967, following which the Commission made its written findings on September 1, 1967 and entered an order revoking the real estate broker's license of Louis Weiner and the real estate salesman's license of Robert L. Solomon.

A combined text of the complaint and order are set forth in the Appendix to Appellants' Jurisdictional Statement at pages 5a - 11a. However, appellants have ommitted a very pertinent statement contained in paragraphs numbered I of both the complaint and order, which read as follows:

> That the respondent, Louis Weiner, doing business as Louis Weiner Real Estate Co., is the holder of a real estate broker's license duly issued by the State Real Estate Commission and was so licensed at all times mentioned herein; that the respondent, Robert L. Solomon, is the holder of a real estate salesman's license duly issued by the State Real Estate Commission of the State of Nebraska, and was so licensed at all times mentioned herein; *and that the respondent, Robert L. Solomon, was at all times mentioned herein a salesman for and acting on behalf of and in the employment of the respondent, Louis Weiner, doing business as Louis Weiner Real Estate Co.* (Emphasis supplied)

From the order of the Commission the appellants, Louis Weiner and Robert L. Solomon, perfected an appeal to the District Court of Douglas County, Nebraska. Prior to the trial, appellants served notice of their intention to introduce additional evidence before the District Court as provided by Section 81-884.02, Reissue Revised Statutes of Nebraska, 1943, which statute is set forth in the appendix hereto, at page 17. Trial was had *de novo* on the record of the proceedings before the Commission and on the additional testimony and exhibits produced at the trial, which trial before the Court occupied two full days. The record of the evidence presented to the Commission, consisting of 248 pages, was introduced in evidence and 266 pages of additional testimony was presented, together with documentary exhibits, as shown by the record herein.

The District Court entered its decree which made findings of facts and conclusions of law, and affirmed the Order of the Commission revoking the real estate licenses of appellants. The decree of the Court provides in part as follows:

> The Court finds generally that all fifty of the petitioners' allegations of error are without merit and that the Court finds that there is ample evidence in the record to sustain all the findings of the respondent Real Estate Commission and that petitioners violated Sec. 81-881 R.R.S. Nebraska, and by their acts and deeds demonstrated their unworthiness to act as real estate licensees.
>
> The parties appeared at the hearing of the Real Estate Commission concerning the revocation of their license, heard the evidence adduced against them and participated and gave evidence in their own behalf and had the same opportunity and had the same situation in the District Court where the matter was tried de novo under the strict rules which they claim they were denied before the respondent commission.
>
> For the above reasons stated the order of the Real Estate Commission of the State of Nebraska dated August 1, 1967, revoking the broker's license of Louis Weiner and the real estate salesman's license of Robert L. Solomon, was proper and is hereby affirmed by this Court in all respects.
>
> It is therefore ORDERED, ADJUDGED and DECREED that the order of August 1, 1967, by the State Real Estate Commission of the State of Nebraska revoking the broker's license of Louis Weiner and the salesman's license of Robert L. Solomon is hereby revoked by this Court and that all costs of the review in this matter are taxed to the petitioners in error.

Appellants then perfected an appeal to the Supreme Court of Nebraska. Briefs were filed and the matter

orally argued to the Nebraska Supreme Court, but no constitutional questions were raised by appellants in either the printed briefs or in oral argument to the Court. These questions were presented to the Nebraska Supreme Court for the first time in a Motion for rehearing, which Motion the Court overruled.

Louis Weiner and Robert L. Solomon are now before this Court on appeal, seeking a reversal of the decision of the Supreme Court of Nebraska which affirmed the judgment and decree of the District Court.

ARGUMENT

I.

The Appeal Does Not Present A Substantial Federal Question.

The Jurisdictional Statement of Appellants presents questions based upon a claimed denial of due process. The questions raise the following issues:

1. The validity of Section 81-881 (15), Reissue Revised Statute of Nebraska, 1943. (Appendix page 14).

2. The claim that the order of the Commission revoking the licenses of appellants makes findings of facts not alleged in the complaint.

3. Charge of prejudice on the part of one of the members of the Commission.

4. Sufficiency of the evidence to sustain the revocation of the real estate broker's license of Louis Weiner and the real estate salesman's license of Robert L. Solomon.

None of these issues submit a substantial federal question.

II.

The Nebraska Statutes Governing Procedure To Be Followed In Disciplinary Action Against A Licensed Real Estate Broker or A Licensed Real Estate Salesman Provide Due Process.

The Nebraska Statutes relating to procedures to be followed in disciplinary proceedings against real estate licensees are set forth in the Appendix hereto, at pages 13-18. These statutes require a written complaint, a hearing and notice thereof (Sec. 81-882), the right to subpoena witnesses and the right to take and use depositions (Sec. 81-883), the right to use the rules of evidence of the District Court (Sec. 81-883), the right to written findings, determination and order by the Commission (Sec. 81-884), the right to cross-examine witnesses [Sec. 84-914 (4)], the right of appeal (Sec. 81-884.01), and the right to a trial *de novo* and to submit additional evidence before the District Court (Sec. 81-884.02). The record discloses that these statutory requirements were strictly followed and all rights of appellants were fully protected.

Section 81-881 enumerates 20 distinct unfair trade practices as grounds for revocation or suspension of a real estate broker or salesman's license. Subsection (15) provides for such revocation or suspension when "the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman whether of the same or of a different character as hereinbefore specified." The Order entered by the Commission makes detailed findings as to the acts of

appellants which are direct violations of numerous of the stated unfair trade practices. Paragraph XII of the Order then states:

> That the respondents Louis Weiner and Robert L. Solomon, and each of them, by their acts as herein set forth, are guilty of violating Section 81-881, R.R.S. 1943, and have by said acts demonstrated their unworthiness and incompetency to act as broker and salesman respectively.

In *Pastori v. Pennsylvania*, 232 U.S. 138, 34 S.Ct. 28, 58 L. Ed 539 (1914), it is said:

> The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160, 57 L.Ed. 164, 169, 33 S.Ct. Rep. 66; *Rosenthal v. New York*, 226 U.S. 260, 270, 57 L.Ed. 212, 216, 33 S.Ct. Rptr. 27; *L'Hote v. New Orleans*, 77 U.S. 587, 44 L.Ed, 899, 20 S.Ct. Rpt. 788.

III.

Where A State Court Decision Rests On Independent Non-Federal Grounds The Supreme Court Will Decline To Review The Case.

We submit that the Court's decision, which is under attack, was based upon express findings of violations of numerous of the subsections of Section 81-881, exclusive of subsection (15), the only provision which appellants contended violates the due process clause of the Fourteenth Amendment. Therefore, the question presented challenging the validity of subsection (15) is not sufficient to justify a review by this Court, since the non-federal grounds are more than adequate to sustain the decision of the Nebraska Courts.

Numerous decisions hold that where a state court decision rests on independent non-federal grounds, the Supreme Court will decline to review the case. *Jankovich* v. *Indiana Toll Road Commission*, 855 S.Ct. 493, 379 U.S. 487 (1965), held:

> " 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.' *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281, 82 S.Ct. 275, 277, 7 L.Ed.2d 285. See also: *Fay v. Noia*, 83 S.Ct. 822, 372 U.S. 391 (1963); and,

Southwest Bell Telephone Co. v. *State of Oklahoma*, 58 S.Ct. 528, 303 U.S. 206, 82 L. Ed. 751 (1938), held that the Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to highest court of the state having jurisdiction, but that its decision of the federal question was necessary to determination of the cause, that federal question was actually decided, or that judgment as rendered could not have been given without deciding it.

IV.

Where An Appeal De Novo To The Courts Is Had From An Administrative Decision, Due Process Defects In The Administrative Hearing Are Cured.

Ample authority exists for the proposition that due process defects in administrative hearings may be satisfied by appeal *de novo*. A leading case is *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 45 S.Ct.

663, 28 L. Ed. 569 (1884), where in an appeal from a tax assessment made on bond, the Court held that where the law provides a method whereby appeal as is appropriate to the nature of the case may be had, " 'The judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. . .' (96 U.S. 97)". The Court further held that the necessity of notice and of opportunity to be heard are satisfied where a hearing in court is allowed.

Bailey v. *Anderson,* 326 U.S. 203, 90 L. Ed. 3, 66 S.Ct. 66 (1945), appears to be a controlling case; the case involved condemnation proceedings brought by the State Highway Commissioner of Virginia. The Court held:

> Here the appellant was given full opportunity to be heard and to introduce evidence before the Commissioners. They could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute. Their award is made subject to judicial review by § 1969 j (2), and upon such review may be set aside if plainly wrong or without support in the evidence. *Barnes v. Tidewater, R.Co.*, 107 Va. 263, 266-68, 58 S.E. 594; *Duncan v. State Highway Commission*, 142 Va. 135, 146-148, 128 S.E. 546. In this *we find no denial of due process, and appellant's contention presents no substantial constitutional question,* as the authorities cited show. (Emphasis added).

De novo review was held to cure an omission of a hearing in fixing liability for support of relatives in a proceeding by the State Public Welfare Commission. *Mallat* v. *Luihm,* 206 Ore. 678, 294 P. 2d 871 (1956) held that:

> While notice and an opportunity to be heard are

> of the essence of due process, it is not required that a hearing shall be given at any particular stage of the proceedings. It is sufficient if, before liability becomes final, the person whose rights are affected is given his 'day in court'. *Stellar v. O'Hara*, 69 Ore. 519, 540, 139 P. 743, L.R.A. 1917 C., 955, Ann. Cas. 1916 A, 217; *Towns v. Klamath County*, 33 Ore. 225, 233, 234, 53 P. 604.

Provisions for a judicial review of administrative orders constituted due process of law in *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (1939); and in *Bourjois, Inc.* v. *Chapman, et al.*, 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027 (1937).

This principle has been applied in other areas of administrative procedure. In *Lichter* v. *United States*, 334 U.S. 742, 791-792, 68 S.Ct. 1294, 1319, 92 L. Ed. 1694 (1948), it was held that the procedure before renegotiation officials could not deny due process, since the statute provided for *de novo* review before the United States Tax Court. See also: *Ewing* v. *Mytinger and Casselberry*, 339 U.S. 594, 70 S.Ct. 870, 94 L. Ed. 1088 (1950), which held that an opportunity for a hearing and a judicial determination being provided, due process requirements are satisfied in an action by the Food and Drug Administrator in seizing property.

The claim of prejudice on the part of one of the members of the Commission, even if true, is answered in the case of *Ours Properties* v. *Ley*, 198 Va. 848, 96 S.E. 2d 754 (1957), which held:

> Should an official act arbitrarily or dishonestly where protection is afforded by appeal and by review in the courts, as in this case, the requirements of procedural due process are satisfied.

Appellants further claim a denial of due process on

the grounds that certain of the acts of which they were found guilty were not alleged in the complaint. These findings, however, related to the transaction wherein appellants were charged with violation of their duties as real estate licensees and naturally the evidence in a hearing of this nature will reveal facts not known at the time to the drafters of the complaint. Setting forth every detail of their actions in the complaint was certainly not required in order to satisfy the due process requirements.

Regardless of this claim, any such defect was cured by the trial *de novo* before the Court. The appeal was a challenge to the findings and order of the Commission, which in effect became the complaint at the trial. Every finding contained in the order was then known to appellants and the additional evidence introduced by appellants during the two day trial was directed to such findings. Can they now claim a denial of due process because of a lack of notice and the right to present evidence to refute these charges? The Courts have held to the contrary.

Appellants' claim that the findings made against the appellants are "totally devoid of evidentiary support" (Jurisdictional Statement, page 6) is entirely unfounded. Both the District Court of Douglas County, Nebraska and the Supreme Court of Nebraska considered this case *de novo* and found ample evidence to sustain the findings. The opinion of the Nebraska Supreme Court concludes:

> . . . Definitely, their dealings in this transaction clearly violate the provisions of Section 81-881, R.R.S. 1943, and their licenses should have been and were properly revoked.

CONCLUSION

No substantial federal question is involved in this appeal and the decision of the Supreme Court of Nebraska should be affirmed, or in the alternative, the appeal should be dismissed.

Respectfully Submitted,

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APPENDIX

81-881. Real Estate Commission; unfair practices, defined. The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any real estate broker or any real estate salesman and shall have the power to revoke or suspend any license, issued under sections 81-862 to 81-887, whenever the broker or salesman has been found guilty of any of the following unfair trade practices: (1) Refusing, because of race, color, national origin or ethnic group, to show, sell, rent, or lease any real estate for sale or rent to prospective purchasers, renters, or lessors; (2) intentionally advertising, whether printed or by radio, display or other nature, which is misleading or inaccurate in any material particular or in any way misrepresents any property, terms, values, policies or services of the business conducted; (3) failing to account for and remit any money coming into his possession belonging to others; (4) accepting, giving or charging any undisclosed commission, rebate or direct profit on expenditures made for a principal; (5) acting in a dual capacity of broker and undisclosed principal in any transaction; (6) guaranteeing or authorizing or permitting any person to guarantee future profits which may result from the resale of real property; (7) placing a sign on any property, offering it for sale or rent, without the written consent of the owner or his authorized agent; (8) offering real property for sale or lease without the knowledge and consent of the owner or his authorized agent or on any terms other than those authorized by the owner or his authorized agent; (9) inducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal; (10)

accepting employment or compensation for appraising real property contingent upon the reporting of a predetermined value or issuing an appraisal report on real property in which he has an undisclosed interest, unless such interest is disclosed in the report; (11) negotiating a sale, exchange or lease of real property directly with an owner or lessor if he knows that such owner has a written outstanding contract, in connection with such property, granting an exclusive agency or an exclusive right to sell to another broker; (12) soliciting, selling or offering for sale real property by offering free lots or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property; (13) representing or attempting to represent a real estate broker, other than the employer, without the express knowledge or consent of the employer; (14) paying a commission or compensation to any person for performing the services of a real estate broker or real estate salesman who has not first secured his license under sections 81-862 to 81-887 or is a nonresident who is licensed in his state of residence; (15) the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman, whether of the same or of a different character as hereinbefore specified; (16) commingling the money or other property of his principals with his own or failure to maintain and deposit in a separate account all money received by a real estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; (17) failure to include a fixed date of expiration in any written listing agreement and failure to leave a copy of such agreement with the principal; (18) failure to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real

estate to the buyer and to the seller; (19) failure by a broker to deliver to the seller in every real estate transaction wherein he acts as a real estate broker, at the time such transaction is consummated, a complete, detailed closing statement, showing all of the receipts and disbursements handled by such broker for the seller; also failure to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what that same were disbursed; the broker shall retain true copies of such statements in his files; or (20) the broker or salesman shall have been convicted of a felony.

81-882. Hearings; notice; how given. (1) Before the commission shall deny any application for a license or before revoking or suspending such license, it shall give the applicant or holder of the license, as the case may be, a hearing on the matter and shall, at least twenty days prior to the date set for the hearing, notify the applicant or license holder in writing. Such notice shall contain an exact statement of the charges against him and the date and place of hearing. (2) The applicant or license holder, as the case may be, shall have full authority to be heard in person or by counsel before the commission in reference to such charges referred to in subsection (1) of this section. Such notice may be served by delivering it personally to the applicant or license holder or by sending it by either registered or certified mail to the last-known business address of such applicant or license holder. If the applicant or license holder is a salesman, the commission shall also notify the broker employing him or in whose employ he seeks to enter by mailing such a notice to the broker's last-known business address.

81-883. Hearings; subpoena; witness fees. In the preparation and conducting of such hearing, the director shall have power to issue and sign subpoenas to require the attendance and testimony of any witness and the production of any papers or books. He may administer oaths, examine the witnesses and take any evidence he deems pertinent to the determination of the charges. Any witness so subpoenaed shall be entitled to the same fees and mileage as is prescribed by law in judicial proceedings in the district courts of this state in civil actions, but the payment of such fees and mileage must be paid out of and kept within the limits of the funds created from such license fees. The party, against whom such charges may be filed, shall have the right to obtain from the director a subpoena for any witnesses which he may desire at such hearing. Depositions may also be taken and used as in civil court cases in the district courts.

81-884. Hearings; findings; order; license; revoked or suspended. After such hearing the State Real Estate Commission shall state in writing, officially signed by all the members concurring therein, its findings and determination and its order in the matter. If the commission shall determine and order that any applicant is not qualified to receive a license, no license shall be granted, and if the commission shall determine that the license holder has been guilty of any violation of the provisions of sections 81-862 to 81-887, his license shall be revoked or suspended forthwith.

81-884.01. Order; appeal; bond; parties; petition; service; answer. Within ten days after an order of the State Real Estate Commission has become final, the applicant for a license or a license holder may obtain judicial review thereof by serving upon the director,

a written notice of such appeal and a demand in writing for a certified transcript for all the papers on file in his office affecting or relating to such order, together with a transcript of the evidence, and the payment of the fee therefor, and he shall, within thirty days from the entry of such order, file a petition for review in the district court for the county where the cause of action or some part thereof arose, together with a bond to the State of Nebraska in the sum of two hundred dollars, with sufficient surety to be approved by the clerk of the district court to which such appeal is taken and shall be conditioned that the applicant for a license or license holder shall pay all costs taxed against him which may accrue to the commission by reason of taking such appeal. In lieu of such bond, a cash deposit of two hundred dollars may be made with the clerk for the same purpose. The petition for review need not be verified but shall state the grounds upon which such review is sought. The commission shall be deemed to be a party to any such review proceedings. The petition for review shall be served upon the director by leaving with him a copy of the petition and the commission shall file its answer within ten days from the date of service of the petition for review.

81-884.02. Appeal; hearing; trial de novo; additional evidence; notice; rebuttal. *In any judicial proceeding under sections 81-884.01 and 81-884.02 the court shall consider the matter de novo upon the record.* The court may on its own motion order additional evidence to be taken before it. *In addition, any party to such review may offer additional evidence before the court; Provided,* that such party shall have served written notice of such offer on the other parties at least ten days prior to the hearing thereof. Such notice

shall set out the nature of the evidence which he so desires to offer and the names of the witnesses whom he intends to call. In such event the other parties may without advance notice offer evidence in rebuttal. Such proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of the state. (Emphasis Supplied)

Section 84-914.

(1) An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence; *Provided, that any party to a formal hearing before such agency, from which a decision may be appealed to the courts of this state, may request that such agency be bound by the rules of evidence applicable in district court by delivering to such agency at least three days prior to the holding of such hearing a written request therefor,* such request to include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof including the cost of court reporting services which the requesting party shall procure for the hearing. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

. . . (4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. (Emphasis Supplied).

CERTIFICATE OF SERVICE

I, Robert A. Nelson, a member of the bar of this court, hereby certify that I served the above and foregoing Motion To Affirm or Dismiss and Brief In Support Of Motion on the appellants by mailing two copies thereof to Harry H. Foulks, 608 Executive Building, Omaha, Nebraska 68102, their attorney of record by forwarding the same by United States mail, postage prepaid, on June 18, 1970.

Robert A. Nelson